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No. 08-272

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JAMES WAYBRIGHT, *et al.*,

Petitioners

v.

FREDERICK COUNTY, MARYLAND, DEPARTMENT OF FIRE & RESCUE SERVICES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioners have presented compelling reasons to grant the Petition where the Fourth Circuit's Opinion affirming the District Court's dismissal of Petitioner's federal constitutional claims does not conflict with a decision of this Court or other courts of appeals, and where the Fourth Circuit's ruling does not implicate an important federal question that has not been settled by this Court.

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STATEMENT OF THE CASE

A. *Factual Background*

Andrew Waybright ("Waybright"), while an employee of the Frederick County, Maryland Department of Fire and Rescue Services ("Department"), died during physical training exercises administered by Respondent Jeffrey Coombe. The exercises were part of a broader training program for Frederick County fire fighter recruits designed to teach and improve upon fire fighting skills. Waybright's injuries were sustained on July 3, 2002, during what was the start of the Department's sixth fire fighter recruit class.

Frederick County's fire fighter recruit program developed in the late 1990's. Development of the recruit program was a product of a mandate requiring already-trained fire fighters to undergo annual refresher training on the operation of the breathing apparatus used when fighting fires. This mandate affected Frederick County's hiring practices with regard to fire fighters.

Specifically, Frederick County could not assume, when hiring trained fire fighters, that the fire fighters had within the previous year undergone the required refresher training. Therefore, when bringing in new hires, even though the new hires were already trained to a certification level of a Fire Fighter I or Fire Fighter II, Frederick County would administer the required refresher training. At the same time, it was decided that the refresher training provided a good

opportunity to evaluate, and perhaps improve upon, the new hires' fire fighting skills, which would benefit Frederick County's fire service and, in turn, the community.

In developing and expanding the program, Department employees visited neighboring jurisdictions to observe the operation of other recruit programs. For instance, Respondent Marc McNeal visited academies located in Howard County, Maryland, Montgomery County, Maryland and Loudoun County, Virginia. Also, Respondent Coombe visited Loudoun County where he observed and participated in that County's academy's physical training program.

The recruit program also benefitted from the Department's membership in the Council of Academies. The Council of Academies is an organization of jurisdictions that conduct state-level fire fighter courses at the local level. Frederick County had been a member of the Council of Academies even before the start of the recruit program, being admitted sometime in the early 1990's. The Council holds monthly meetings where broad ranges of topics are discussed and views shared, including fire fighter training. Those involved with the Department's recruit program attended these meetings.

As the recruit program continued to grow, a decision was made to invite independent instructors to observe the operation of the classes. Specifically, three instructors from Montgomery County's recruit academy were invited to observe a "live burn" exercise. The Department was seeking feedback from these instructors as to any additional safety measures that might be implemented.

Moreover, and specifically pertaining to the physical training aspect of the recruit program, early in the program the Department sent certain individuals, including Respondent McNeal, for specialized training. Specifically, these individuals attended a program and were trained as physical fitness coordinators, though the program through which they were certified would ultimately be discontinued.

With regard to the Frederick County instructors, most came from the field, *i.e.*, from Frederick County fire stations where the instructors worked as fire fighters. Also, sometimes instructors came from neighboring jurisdictions to teach classes.

The recruit program's core curriculum was based upon the curriculum offered by the Maryland Fire and Rescue Institute ("MFRI"). The classes taught at the recruit school followed lesson plans developed by MFRI. For any particular class, the lesson plans established the number of instructors, including support instructors, needed to teach and participate in the class. For instance, to teach a fire suppression class involving a "live burn" exercise, more instructors were needed. At no time were specific recruit classes to be held if the requisite amount of instructors per MFRI were not available. It is notable that as of 2002, MFRI did not offer a fire fighter physical training class.

For Recruit Classes I-VI, the overall administration, which included scheduling and other logistical matters, was carried out by Respondent Stan Poole, Respondent McNeal and a Lieutenant Kevin Finnin. Specifically, Respondent Poole administered Recruit

Classes I and II. Each of these classes lasted approximately two weeks. Respondent McNeal, with Respondent Poole's assistance, administered Class III, which lasted approximately three weeks. Respondent McNeal also administered Recruit Classes IV (approximately four weeks) and V (approximately six to seven weeks), with assistance by Lieutenant Finnin. Class VI, the class in which Waybright was a recruit, was administered by Lieutenant Finnin.

Class VI was scheduled to be the longest program yet, because it was the first class to include both previously-trained fire fighters, like Waybright, and individuals with no previous fire fighting experience. Respondent Poole believed that a longer program would produce better fire fighters. Moreover, it was believed that by offering a recruit class that included spots for those with no prior fire fighting experience, diversity within the Department would be better achieved. A County diversity survey determined that the Department of Fire and Rescue Services was the least diverse.

Recruit Class VI was scheduled for approximately twenty weeks and thirteen recruits had been accepted. Leading up to Class VI, Lieutenant Finnin, due to the increased length of the schedule, voiced concern as to whether there was enough time to schedule the instructors for all the classes before the start of Class VI. Moreover, there was also concern as to whether there were enough available instructors in the field to teach the scheduled classes. Lieutenant Finnin wondered whether the start of Class VI ought to be postponed. These concerns were brought to the attention of Respondent Poole.

Respondent Poole took these concerns under consideration. He realized that if the class was postponed to begin later in 2002, then the funds to pay the instructors to teach the classes may no longer be available. Moreover, he understood that the only way to fill the thirteen vacancies in the Frederick County fire stations was to run the recruit class. If Recruit Class VI were postponed, the vacancies would not be filled. Therefore, Respondent Poole decided to begin Recruit Class VI as scheduled with some changes to its content.

In preparation for Recruit Class VI, the recruit program's instructors attended a safety orientation held at the Training Facility. The orientation was developed by a MFRI instructor, and it covered various safety-related topics. It addressed safety measures to be taken when teaching classes at the Training Facility. All instructors were to attend the orientation, and Respondent Coombe did attend.

Before the start of Class VI, each recruit that had been accepted into the recruit program received a letter. The letter congratulated the recruits on their acceptance into the recruit program. It also directed them to begin acclimating themselves to the present summer weather conditions and to "start hydrating." It was expected from the new recruits that they consume at least one gallon of water daily in order to keep hydrated. It also required the recruits to bring, among other things, "a one-gallon (minimum) water container" to be carried with the recruits at all times for hydration during Recruit Class VI. The letter reiterated what the recruits had already learned while preparing for the Candidate Physical Ability Test

("CPAT"), the test that determined whether the recruits would be accepted into the recruit program.

All recruits had to pass a medical exam and the CPAT in order to be hired, as Waybright had. In preparation for the CPAT, potential recruits attended a CPAT orientation held by the Department and received a Preparation Guide. The Preparation Guide emphasized hydration and it also set forth an exercise program for the potential recruits to follow in order to prepare for the CPAT. At the end of the preparation, the potential recruits were to be able to run "3 miles at an easy pace being sure to be able to talk the entire time." At the CPAT orientation, the recruits were told that, should they pass the CPAT and be hired as a recruit, they were expected to maintain the same level of physical condition in preparation for the start of the recruit program. After passing the CPAT, and after passing a physical medical exam, Recruit Class VI began for the new recruits.

With regard to the physical training portion of the program, Respondent Coombe was the instructor. He had previously served in this same position for Recruit Classes IV and V and, based on past student evaluations, he was one of the highest rated instructors in the program. He was a Fire Fighter III and an emergency medical technician ("EMT"). He had also completed training as a paramedic. As a Fire Fighter III and EMT, Respondent Coombe had years of service and training and was himself a graduate of the Department's Recruit Class II.

On the first day of physical training, Respondent Coombe presented a power point presentation that covered matters relating to health and fitness, safety and hydration. The recruits then went on an approximate 2 mile run and performed calisthenics. This completed the recruits' first day of physical training.

It was during the physical training on the second day of class, July 3, 2002, when Waybright died. On this second day, Waybright, already a trained Fire Fighter II, was an employee of the Department of Fire & Rescue Services and a recruit in Recruit Class VI. One aspect of the recruit program included maintaining the requisite physical fitness needed to perform the job of a fire fighter. Respondent Coombe, leading the physical training that day, worked under the assumption that the recruits had maintained the same level of physical condition needed to pass the CPAT.

As was his practice, about a week before July 3, 2002, Respondent Coombe requested that another instructor be present with him for the physical training exercises. The second person would operate a John Deere four-wheel Gator, which would follow behind Respondent Coombe and the recruits during off-campus training runs. The Gator typically carried a 5-gallon jug of water, medical equipment and a backboard. While the Gator was not used on every off-campus jog, Respondent Coombe intended to use it on July 3, 2002. Also, on longer runs, a radio would be taken.

The Department also had an outdoor weather policy prohibiting outdoor activities when the heat index reached 110 degrees Fahrenheit. The Policy was consistent with accepted fire service practice.

Leaving his house, and upon arriving at the Training Center on July 3, 2002, Respondent Coombe discovered that, despite his request for an additional instructor to follow the off-campus training exercises, no such person was present. Moreover, he discovered that the Gator and radio were unavailable because the keys to access the equipment were locked in a room inaccessible to him. The room was only accessible to those with offices at the Training Center. None of those individuals had yet arrived. These circumstances on July 3 were out of the ordinary; this was the first time Respondent Coombe arrived to conduct physical training exercises to find that those with the keys to access the Training Facility were absent. With Recruit Class VI arriving for their second day of class, Respondent Coombe prepared to move forward.

Respondent Coombe and others carried the 5-gallon water jug to the base of a fire tower located on the Training Facility grounds. Additionally, as they had been instructed to bring, all the recruits had their own gallon bottles of water. The physical training then began at 7:00 a.m.

Respondent Coombe and the recruits started with a half-mile walk. They then commenced an approximate 2.5-3.0 mile run, which ultimately took them to a nearby park and back to the Training Facility. At some point, a Fire Fighter Eckhoff joined Respondent Coombe and the recruits on their run.

Reaching the park, they took a short rest and then began calisthenics. After the calisthenics, they commenced a run of approximately 600-700 yards to the

bottom of a hill in the park. Reaching the bottom of the hill, they assembled for wind sprints up a hill, approximately 300 feet in length, in groups of two. After the wind sprints, Respondent Coombe, Fire Fighter Eckhoff and the recruits took time at the top of the hill to assemble in double-line formation for the jog back to the Training Facility, which was approximately 1000 yards. It was Respondent Coombe's intention upon reaching the Training Facility to complete the physical training for the day with stretching.

However, on the jog back to the Training Facility, Respondent Coombe was notified that Waybright was experiencing problems. Respondent Coombe and Fire Fighter Eckhoff approached Waybright to assess his condition. Waybright was coherent, alert and oriented. He answered all of Respondent Coombe's and Fire Fighter Eckhoff's questions and informed them that he was alright. Waybright continued walking back toward the Training Facility. Waybright, however, then began to stumble, and Respondent Coombe and Fire Fighter Eckhoff asked Waybright to sit down on the grass. Waybright refused, wanting to finish the exercises with his class. Respondent Coombe and Fire Fighter Eckhoff managed to have Waybright sit down, at which time Waybright began to crawl on his hands and knees back toward the Training Facility stating that he wanted to finish with his class. At this point, Respondent Coombe observed that Waybright was exhibiting signs of heat stress necessitating assistance. Respondent Coombe told Fire Fighter Eckhoff to remain with Waybright while Respondent Coombe went back to the Training Facility for help. Respondent Coombe intended to get Waybright in the shade, get him cooled off and get him some liquids.

At the Training Facility, Respondent Coombe instructed a Fire Fighter Grossnickle to take a pick up truck and assist Fire Fighter Eckhoff with Waybright, both of whom were within sight of the Training Facility. Respondent Coombe realized that it was necessary to get Waybright attention. Understanding that Fire Fighters Grossnickle and Eckhoff, both EMTs, could assist Waybright back to the Training Facility, Respondent Coombe returned to his unattended recruits who had previously been instructed to return to the Training Facility grounds and begin stretching.

When Fire Fighter Grossnickle reached Waybright and Fire Fighter Eckhoff, Waybright was unconscious. Fire Fighter Grossnickle, therefore, returned to the Training Facility to alert someone to call 911 and then returned to Waybright. Respondent Coombe dismissed the recruit class, and he, too, returned to Waybright, which was approximately 10-15 minutes after leaving Waybright with Fire Fighter Eckhoff to get help. By then, an ambulance, paramedics and a rescue squad had arrived and CPR was being administered. Waybright was placed in the ambulance, and he was later pronounced dead.

An autopsy was performed by the Medical Examiner to determine Waybright's cause of death. The Report determined the cause to be hyperthermia. Vitreous electrolyte testing revealed no evidence of dehydration.

After the occurrence, physical training during Recruit Class VI was suspended. After Recruit Class VI, there were no more recruit classes until August, 2004.

Respondent Poole responded to the tragedy, the first of its kind, by assembling an independent Board of Inquiry. The Board consisted of eight members who investigated the circumstances of the occurrence. The members included individuals from Frederick County as well as individuals from neighboring jurisdictions, MFRI and the International Association of Fire Fighters. Respondent Walter Murray served as the Chair of the Board.

After an extensive investigation, the Board made certain findings and recommendations. The Board interviewed other recruits in Class VI and determined that many, during the calisthenics on July 3, 2002, felt dizzy or disoriented. It also found that only one of the recruits reported his symptoms to Respondent Coombe during the training. That recruit was directed to rest on a nearby guardrail. There was no finding that Respondent Coombe intended to inflict injury upon any of the recruits or that any of the recruits were threatened against their will to participate.

The Board also determined the temperature and heat index at various points in time during the physical training. It found that at the start of the physical training, the temperature was 75 degrees with the heat index at 80. When the 911 call was placed reporting Waybright's condition, the temperature was 86 degrees with the heat index at 96. The Board found that the Department's Outdoor Weather Policy was consistent with accepted fire service practice and replicated from MFRI recommendations. At no time during the physical training did the heat index exceed the Department's Outdoor Weather Policy or even Petitioners' expert's proposed alternative.

After the Board's investigation, disciplinary proceedings were brought against Respondent Coombe. The proceedings were brought against Respondent Coombe for failing to recognize as an emergency medical technician the seriousness of Waybright's condition and for failure to respond properly to Waybright's condition.

The Board of Inquiry made certain recommendations in an attempt to prevent future occurrences. The recommendations made by the Board were used to revamp the recruit program. Specifically, changes were made to the physical training portion of the program. The Department hired a wellness and fitness coordinator, and physical training activities are now based upon individual assessments of each recruit, which in turn yields a baseline performance level for the entire class. Additionally, before recruits begin a session of physical training, each recruit's blood pressure, heart rate and weight is measured for monitoring purposes.

B. *Procedural Background*

Petitioners, the parents of Waybright, have pursued claims in Maryland's Workers' Compensation Commission, the Circuit Court for Frederick County, Maryland, the United Sates District Court for the District of Maryland and the United States Court of Appeals for the Fourth Circuit.

Petitioners initially sought relief from Maryland's Workers' Compensation Commission ("Commission"). The Commission on August 25, 2003 determined that Petitioners were not partially dependent upon their son, Waybright, for financial support. Petitioners did receive

compensation benefits for medical and funeral expenses, but were denied further benefits because they were found not dependent upon Waybright. Petitioners thereafter filed an appeal of the Commission's decision on the dependency issue (an appeal which is today pending but stayed) and then a lawsuit asserting state tort law claims.

The instant civil lawsuit was initially filed in the Circuit Court for Frederick County, Maryland alleging only state law tort claims sounding in negligence. Because Maryland's workers' compensation law provided Petitioners an exclusive remedy, Respondents moved for summary judgment. The Circuit Court on November 17, 2004, dismissed Petitioners' survival action, as Petitioners' counsel conceded was the correct result during oral argument on the motion, and the Circuit Court advised it would shortly issue its decision on the wrongful death action. With the decision imminent, Petitioners amended their lawsuit to assert constitutional claims.

The constitutional claims in Petitioners' Second Amended Complaint are premised upon alleged omissions that allegedly demonstrate Respondents' "deliberate indifference" to workplace safety (i.e., failure to provide water; failure to provide proper clothing; failure to provide communication devices; failure to provide transportation; failure to provide medical assistance; failure to properly instruct and supervise training officers and employees). (Pet. App. at 40a). The claims arise from Waybright's fatal injuries occurring during physical training exercises led by Respondent Coombe on July 3, 2002, and include allegations of

supervisory liability. There is also a claim of municipal liability against Frederick County.

The Second Amended Complaint does *not* allege, nor is there any evidence, that Respondent Coombe physically assaulted or deliberately intended to injure Waybright, that he confined, detained or in any way restricted Waybright's liberty, or that he threatened or coerced Waybright forcing him to participate in the physical training exercises. Like Waybright's employment with Frederick County, his participation in the training exercise was completely voluntary.

It is significant that Petitioners' claims began in Maryland's Workers' Compensation Commission, because, fundamentally, Petitioners' case rests upon allegations of an unsafe work environment. The District Court recognized this when it said, "It is impossible to square [the holding in *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 112 S.Ct. 1061 (1992)] with Plaintiffs' argument that 'the fire department created the danger by establishing the completely unsafe training program [that] Andrew Waybright participated in.'" (Pet. App. at 48a).

After Petitioners amended their lawsuit to include federal constitutional claims, Respondents removed the case to the United States District Court for the District of Maryland. Over a year of discovery ensued, and Respondents moved for summary judgment.

The District Court on March 1, 2007, entered judgment in favor of Respondents on the federal and state constitutional claims and remanded the state tort

law claims to the Frederick County Circuit Court where those claims remain pending. The District Court found no evidence of conscience-shocking conduct in the constitutional sense committed by Respondent Coombe. (Pet. App. at 51a). Therefore, because the allegations against Respondent Coombe did not support a due process violation, the constitutional claims against the remaining Respondents premised upon supervisory and municipality constitutional liability, also failed. (Pet. App. at 53a). In addition, with respect to the supervisory liability claims, the District Court found neither evidence that the supervisory Respondents had knowledge of conduct posing a risk of constitutional injury nor evidence that any such conduct was widespread. (Pet. App. at 53a-54a). Petitioners took their case next to the United States Court of Appeals for the Fourth Circuit.

The Court of Appeals affirmed in part and reversed in part the ruling of the District Court. With respect to the federal constitutional claims, the Court of Appeals, relying upon well-established law, held that judgment was properly entered in favor of Respondents. (Pet. App. at 20a). The Court found that "under no construction of events could Coombe be said to have intended Waybright's death," and it rejected Petitioners' argument that "deliberate indifference," under the facts of this case, could shock the conscience in a constitutional sense. (Pet. App. at 12a-18a). With respect to the state constitutional claims, the Court of Appeals reversed the District Court's decision and directed that the state constitutional claims be remanded to and decided by the state court. (Pet. App. at 21a).

REASONS FOR DENYING THE PETITION

The decisions of the Court of Appeals and the District Court do not conflict with decisions of this Court or any other courts of appeals. Nor do the decisions implicate a federal question that has not been decided by this Court. To the contrary, the decisions were properly guided by the opinions in *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S. Ct. 1708 (1998) and *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 112 S. Ct. 1061 (1992). Petitioners, therefore, have not presented any compelling reasons warranting a writ of certiorari.

I. The Decisions of the Court of Appeals and District Court are Consistent with and Properly Guided by the *Lewis* and *Collins* Decisions

The Court of Appeals properly applied the holdings in *Lewis* and *Collins*. Petitioners conjure a holding in *Lewis* that in fact was not made, and they recast the allegations and facts of this case in an attempt to avoid the result dictated by *Collins*.

A. *Lewis* does not hold that, whenever there is time to deliberate, without more, "deliberate indifference" can rise to a conscience shocking level.

Contrary to Petitioners' argument, this Court in *Lewis* did not hold that a state officer's deliberate indifference could be conscience-shocking in the constitutional sense whenever an officer has time to deliberate. (*See* Pet. at 11-12). Rather, the *Lewis* decision

confirmed the long-understood "touchstone of due process," protection of the individual against arbitrary government action. 523 U.S. at 845. The *Lewis* decision further confirmed "the cognizable level of executive abuse of power as that which shocks the conscience." *Id.* at 846.

Petitioners misconstrue the holding in *Lewis* in an attempt to manufacture a conflict between the decisions of the lower courts and this Court's decision in *Lewis*. Petitioners argue that, per *Lewis*, executive action exhibiting the characteristic of "deliberate indifference" might be conscience-shocking whenever there is time to deliberate. (*See* Pet. at 11-12). This was not the holding in *Lewis*.

The Court in *Lewis* held "that high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressible by an action under § 1983." *Id.* at 854. Considering the applicable standard of culpability that might rise to a conscience-shocking level, this Court contrasted the context of a high-speed chase with that of a custodial setting. *Id.* at 851-53. With the custodial setting, a State's deliberate indifference to the needs of a prisoner could be conscience-shocking because "forethought about an inmate's welfare is not only feasible *but obligatory* under a regime that incapacitates a prisoner to exercise ordinary responsibility for his own welfare." *Id.* at 852 (emphasis added). Petitioners fail to appreciate this Court's emphasis on the relevance of the custodial setting. (Pet. at 11-12). It is only when a state imposes a limitation upon a person's freedom that the Constitution

requires the state "to assume some responsibility for his safety and general well-being." *DeShaney v. Winnebago County Dep't. of Social Services*, 489 U.S. 189, 200, 109 S. Ct. 998, 1005-06 (1989). Therefore, deliberate indifference to the safety and well-being of a person in custody may shock the conscience not simply because there was time to deliberate, as Petitioners have argued, but because there is a constitutional requirement to provide for the safety and general well-being of the person in custody. *Lewis*, 523 U.S. at 851. The *Lewis* case did not involve a custodial setting, and this Court determined that deliberate indifference could not rise to the requisite conscience-shocking level. 523 U.S. at 854.

The decision of the Court of Appeals was consistent with and properly guided by *Lewis*. It recognized that only executive conduct that "shocks the conscience" will be "wrong enough to register on a due process scale." (Pet. App. at 11a). It recognized that "[f]or a due process challenge to executive action to succeed, the general rule is that the action must have been 'intended to injure in some way unjustifiable by any government interest.'" (Pet. App. at 11a (quoting *Lewis*, 523 U.S. at 849)). It also recognized that when a due process violation is presented based upon alleged conduct of a lesser culpability than intent to injure, such as deliberate indifference, "an exact analysis" of the circumstances presented must be made "before any abuse of power is condemned as conscience shocking." (Pet. App. at 12a (quoting *Lewis*, 523 U.S. at 850)).

The Court of Appeals undertook an exact analysis of the circumstances presented and correctly held that

deliberate indifference under the facts of this case could not rise to the requisite conscience-shocking level, just as the District Court had held. (Pet. App. at 12a-18a). *Lewis*, therefore, does not supply Petitioners with a compelling reason for grant of a writ of certiorari.

B. Petitioners cannot avoid the result dictated by *Collins*.

It is significant that the first sentence of the opinion of the Court of Appeals indicates that "Andrew Waybright died by accident" (Pet. App. at 3a), because Petitioners, from the start, prior to amending their lawsuit with constitutional claims, have maintained that the death resulted from negligence. (Pet. App. at 5a). Even after amending their lawsuit, Petitioners never asserted that Respondent Coombe intended Waybright's death or even intended to harm Waybright. (*See* Pet. App. at 12a). Furthermore, it is clear that Petitioners' claim all along has premised the alleged constitutional deprivation on the failure of Respondents to provide a safe workplace. Specifically, Petitioners argued before the District Court that "'the fire department created the danger by establishing the completely unsafe training program [that] Andrew Waybright participated in.'" (Pet. App. at 48a (quoting Pls.' Surreply at 13)).

In *Collins*, a widow of a sewer worker who died on the job brought a substantive Due Process claim against the city that employed her husband. 503 U.S. at 117. The widow alleged that: "her husband's death was caused by the City's policy of not providing safety training to its employees; there was a custom for safety equipment to either not be taken to, or used at, the job site; no

warnings or instructions were given on the hazards in entering sewer lines or how to protect against them; several months before her husband's death, his supervisor entered a manhole and was rendered unconscious, placing the City on notice of the risks in sending its employees into the lines; the City systematically and intentionally failed to provide the equipment, training or instruction required by the Texas Hazard Communication Act; and *inter alia*, this pattern of behavior by the City was a custom and policy of deliberate indifference to the Fifth and Fourteenth Amendment rights of its employees." *Collins v. City of Harker Heights, Texas*, 916 F.2d 284 (5th Cir. 1990).

This Court, rejecting the widow's claim, explained:

> Neither the text nor the history of the Due Process Clause supports petitioner's claim that the governmental employer's duty to provide its employees with a safe working environment is a substantive component of the Due Process Clause. '[T]he Due Process Clause of the Fourteenth Amendment was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression." [citations omitted]
>
> . . .
>
> Petitioner's submission that the city violated a federal constitutional obligation to provide its employees with certain minimal levels of safety and security is unprecedented. It is quite different from the constitutional claim

advanced by plaintiffs in several of our prior cases who argued that the State owes a duty to take care of those who have already been deprived of their liberty. . . . [citations omitted] Petitioner cannot maintain, however, that the city deprived Collins of his liberty when it made, and he voluntarily accepted, an offer of employment.

We are also not persuaded that the city's alleged failure to train its employees, or to warn them about known risks of harm, was an omission that can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense. Petitioner's claim is analogous to a fairly typical state-law tort claim: The city breached its duty of care to her husband by failing to provide a safe work environment. Because the Due Process Clause 'does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society,' [citations omitted] we have previously rejected claims that the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law. . . . [citations omitted] The reasoning in those cases applies with special force to claims asserted against public employers because state law, rather than the Federal Constitution, generally governs the substance of the employment relationship. . . . [citations omitted]

> Our refusal to characterize the city's alleged omission in this case as arbitrary in a constitutional sense rests on the presumption that the administration of government programs is based on a rational decisionmaking process that takes account of competing social, political, and economic forces. [citations omitted] Decisions concerning the allocation of resources to individual programs, such as sewer maintenance, and to particular aspects of those programs, such as the training and compensation of employees, involve a host of policy choices that must be made by locally elected representatives, rather than by federal judges interpreting the basic charter of Government for the entire country. The Due Process Clause 'is not a guarantee against incorrect or ill-advised personnel decisions.' [citations omitted] Nor does it guarantee municipal employees a workplace that is free of unreasonable risks of harm.
>
> . . .
>
> In sum, we conclude that the Due Process Clause does not impose an independent federal obligation upon municipalities to provide certain minimal levels of safety and security in the workplace and the city's alleged failure to train or to warn its sanitation department employees was not arbitrary in a constitutional sense.

503 U.S. at 126-30.

Attempting to avoid this Court's holding in *Collins*, Petitioners cite two courts of appeals cases: *Jensen v. City of Oxnard*, 145 F.3d 1078 (9th Cir.), *cert. denied*, 525 U.S. 1016 (1998); and *Hawkins v. Holloway*, 316 F.3d 777 (8th Cir. 2003).[1] (Pet. at 14-16). Hoping to set the instant case apart from *Collins*, and thereby manufacture a conflict between the Fourth Circuit's decision *sub judice* and *Collins*, Petitioners now recast the allegations and facts of their case attempting to align their case with *Jensen* and *Hawkins*. The allegations and facts in those cases, however, do not compare.

In *Jensen*, Officer Jensen was shot and killed by a fellow officer, Sergeant Daniel Christian, during a SWAT Unit raid to serve a search warrant. 145 F.3d at 1081. It was undisputed that Sergeant Christian mistook Officer Jensen "for a gun-wielding occupant of the premises and shot him to death." *Id.* at 1082. The Ninth Circuit, within the procedural context of a motion to dismiss, found support in the law for "[t]he allegation that Sergeant Christian, by *intentionally shooting* at a figure he

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1. Respondents also cite *Eddy v. Virgin Islands Water and Power Authority*, 955 F. Supp. 468 (D. VI. 1997), out of the District Court for the Virgin Islands. As a decision from the District Court, it does not present a "compelling reason" for a writ of certiorari. *See* Sup. Ct. R. 10. Moreover, the decision of the District Court, made in the context of a motion to dismiss, found that the complaint "alleged that defendants acted with significantly more than just reckless indifference." 955 F. Supp. at 475. The District Court found "that reasonable minds could find that the defendants at best sanctioned, at worst intended Mr. Eddy's catastrophic injury . . . ." *Id.* Such were not the allegations in the instant case, nor does the record demonstrate any such intentions on the part of the Respondents.

mistook to be an armed criminal, engaged in a Fourth Amendment seizure. . . ." *Id.* at 1083 (emphasis added). The allegations in *Jensen*, therefore, properly stated a violation of a constitutional right: the unreasonable seizure of Officer Jensen through means of excessive and deadly force "intentionally applied." *Id.* at 1082-83.

That it was alleged in *Jensen* that Officer Jensen's Fourth Amendment right was violated is the first point of departure from the instant case, which alleged a violation of the Fourteenth Amendment. Indeed, when distinguishing the facts of *Jensen* from "safe workplace" cases governed by *Collins*, the Ninth Circuit stressed that the *Jensen* case "alleges a particular constitutional violation–Fourth Amendment seizure–which exists independent of the workplace." *Id.* at 1084, n 1. An unconstitutional seizure may exist whenever there "'is a governmental termination of freedom of movement through means intentionally applied' and a 'seizure occurs even when an *unintended* person or thing is the object of the detention or taking.'" *Id.* at 1083 (quoting *Brower v. County of Inyo*, 489 U.S. 593, 596-97, 109 S.Ct. 1378 (1989)) (emphasis added). In *Jensen*, therefore, it was of no moment that Officer Jensen was the "object of detention" while at work, because a constitutional violation occurred once Sergeant Christian intentionally applied the force resulting in the detention.

Petitioners do not claim that Respondent Coombe violated Waybright's Fourth Amendment right to be free from unreasonable seizures. Instead, Petitioners have claimed only that Respondent Coombe's deliberate indifference to Waybright's needs, needs allegedly developing as the result of an "unsafe training program"

(Pet. App. at 48a), amounted to a violation of Mr. Waybright's substantive due process rights. (*See* Pet. App. at 34a and 40a). Quintessentially, Petitioners' case against all Respondents is that they failed to protect Waybright from an unsafe work environment.

The second point of departure from the *Jensen* case is the allegation in *Jensen* of intentional conduct on the part of Sergeant Christian. 145 F.3d at 1082. Attempting to bring their case closer to *Jensen*, Petitioners now characterize their case as one involving "Waybright's right *not* to be *affirmatively* injured by a state actor." (Pet. at 13 (emphasis in original)). Petitioners, however, have never claimed or alleged that Respondent Coombe intended to injure Waybright, nor do the facts, after much discovery, support such a claim. Petitioners' claim has been to this point premised upon alleged omissions allegedly causing an unsafe workplace. The Court of Appeals, with a proper view of the record, rightfully determined that "under no construction of events could Coombe be said to have intended Waybright's death." (Pet. App. at 12a).

The *Hawkins* case similarly involved allegations and facts distinct from this case. In *Hawkins*, it was alleged that a sheriff threatened to shoot employees by pointing a loaded handgun at them. 316 F.3d at 780. The *Hawkins* court, when distinguishing its factual scenario from "safe workplace" cases governed by *Collins*, pointed out that such conduct by a police officer would violate substantive due process rights *regardless* of whether directed toward co-employees or ordinary citizens. *Id.* at 787-88 (citing *Black v. Stephens*, 662 F.2d 181 (3d Cir. 1981), *cert. denied*, 455 U.S. 1008 (1982); *Robinson v. Solano*

County, 278 F.3d 1007 (9th Cir. 2002)). Like *Jensen*, and unlike this case, the alleged conduct at issue in *Hawkins* was intentional and supported a constitutional violation independent of the workplace context. Petitioners' constitutional claim, on the other hand, is premised solely upon allegations of an unsafe workplace, and *Collins* controls such claims.

Considering Petitioners' allegations and the record, the Fourth Circuit properly recognized *Collins* as binding precedent. (Pet. App. at 17a-18a). With respect to *Collins*, the Court of Appeals found it "right on point, for plaintiffs' state-created danger claim, in essence, is that Coombe created an unsafe workplace that caused a prospective employee harm." (Pet. App. at 17a).

II. The Decisions of the Court of Appeals and District Court do Not Conflict with Decisions of Other Courts of Appeals.

The very essence of Petitioners' substantive due process claims are not, of course, that Respondent Coombe affirmatively acted upon Waybright intending his death. Rather, the claims are premised upon his alleged failure to assure that certain precautions were in place while conducting the physical training. Certainly, conducting physical training is not in and of itself unconstitutional. Rather, it is Petitioners' position that conducting training without a ready or adequate supply of water, without communication devices and the like caused a constitutional deprivation, a position which *Collins* has addressed.

Yet, in argument below and now, the Petitioners characterized Waybright's constitutional right at issue as the "right *not* to be *affirmatively* injured by a state actor." (*See* Pet. at 13 (emphasis in original)). Petitioners, therefore, argued for application of the "state-created danger" exception to the general rule that only intentional, malicious conduct will give rise to a constitutional due process claim. Petitioners clearly did so to try to avoid the application of *Collins*. The District Court and the Fourth Circuit correctly rejected Petitioners' argument for application of the deliberate indifference standard *vis-a-vis* a state-created danger because in sum, Petitioners merely claimed that the danger that the Respondents in this case created was a failure to provide a safe workplace. (Pet. App. at 17a).

Now, Petitioners go one step further. They argue that the deliberate indifference standard may be applied, and has been in cases in some of the Circuits, *even without* a special circumstance such as custody or the state created danger. (Pet. at 18). Petitioners know that they must, because arguing merely that the Fourth Circuit and District Court were wrong in failing to apply a properly stated rule of law is "rarely" grounds for issuance of a writ of certiorari. Sup. Ct. R. 10. So, Petitioners now assert a conflict among Circuits by arguing that there is support for applying the deliberate indifference standard even in absence of the state-created danger. As explained below, no such support exists, a fact that serves to uncover Petitioners' true basis for their Petition: their belief that the courts below wrongly decided their case.

The courts of appeals decisions Petitioners cite from the Third, Sixth and Tenth Circuits are consistent with this Court's decision in *DeShaney*, as are the courts of appeals decisions from the District of Columbia and Fourth Circuits. The cases have *not* held that state conduct exhibiting deliberate indifference to a person's needs can rise to a constitutionally conscience-shocking level absent a "limitation which it has imposed on his freedom to act on his own behalf." *See DeShaney*, 489 U.S. at 200.

A. There is no conflict between the Fourth Circuit's decision in this case and decisions from other courts of appeals.

This Court in *DeShaney* has explained that "in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals." 489 U.S. at 198. Describing those circumstances, this Court explained, "The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, *but from the limitation which it has imposed on his freedom to act on his own behalf.*" *Id.* at 200 (emphasis added). The decisions cited by Petitioners do not conflict, but rather are consistent, with *DeShaney* and each other.

1. Third Circuit

Petitioners cite as their first case purportedly evidencing a conflict "between the circuits" *Marvel v. Delaware County*, Civil Action No. 07-5054, 2008 WL 1700536 (E.D. Pa. April 10, 2008). (Pet. at 18). This is

not a published decision by the Court of Appeals for the Third Circuit. It cannot present a "compelling reason" for a writ of certiorari. *See* Sup. Ct. R. 10.

Regardless, the *Marvel* case does not represent a conflict. The Third Circuit recognized the general rule stated in *DeShaney* that "the Due Process Clause does not impose an affirmative obligation on the state to protect its citizens." 2008 WL 1700536, *3. Consistent with *DeShaney*, in the context of a motion to dismiss, the Court found that plaintiffs had stated a claim given the circumstances of the case, which involved a limitation on the freedom of the decedent to act on his own behalf. *Id.* at *7.

The decedent died while participating in a court-mandated community service program. *Id.* at *1,5. The decedent entered into the program "in lieu of trial and conviction and, by the program's express terms, community service was mandated." *Id.* at *5. With respect to the decedent's work assignment, the court emphasized that "the County *required* him to work at a construction site in an Excessive Heat Warning in order to satisfy his requirements." *Id.* at *6 (emphasis added). It was alleged that the County, though requiring the decedent to work in extreme weather conditions, did not provide an adequate supply of water and "did not allow community service workers to use their cell phones to call family members so that they could bring them water." *Id.* at *5. Given the limitations on the decedent's ability to care for himself because he was in custody of the County, and the requirement that the decedent work at the construction site, the court's denial of defendants' motion to dismiss is consistent with

DeShaney. The case does not present a conflict. Waybright's voluntary employment and participation in the physical training program does not remotely equate to the circumstances presented in *Marvel*.

The Petitioners also cite parenthetically the Third Circuit cases of *Rivas v. City of Passaic*, 365 F.3d 181 (3d Cir. 2004), *Ziccardi v. City of Philadelphia*, 288 F.3d 57 (3d Cir. 2002) and *Miller v. City of Philadelphia*, 174 F.3d 368 (3d Cir. 1999). None of these cases present a conflict.

In *Rivas*, the decedent, after having been forcibly restrained, handcuffed and arrested by police officers, sustained fatal injuries. *Id.* at 187, 189. The arrest occurred after paramedics called the police claiming to have been assaulted by the decedent. *Id.* at 196. The Court of Appeals, deciding that a question of fact existed as to whether the paramedics violated the decedent's substantive due process rights, explained that a jury could determine that the paramedics misrepresented to the police that the decedent had assaulted them thereby leading to the decedent's arrest. *Id.* at 196. It further explained that a jury could find that the paramedics failed to inform the police about a possible medical condition of the decedent and abandoned control over the situation once the police restrained the decedent. *Id.* at 197.

Based upon the possible circumstances, which involved a limitation on the decedent's freedom, the Third Circuit held that the paramedics' conduct might shock the conscience if there were evidence that the paramedics "consciously disregarded a great risk of

serious harm. . . ." *Id.* at 196. The facts and the opinion in the *Rivas* case comport with the *DeShaney* opinion, because an affirmative duty possibly existed *because* the decedent was arrested, an arrest caused by the paramedics' alleged fraudulent representations. *Id.* The decision does not represent a conflict among the circuits with respect to the application of the "deliberate indifference" standard.

In fact, the *Rivas* case did not even apply a "deliberate indifference" standard, instead applying a higher standard requiring a showing of conscious disregard of a great risk of serious harm. *Id.* at 202 (concurring opinion) (noting "it is no longer enough that she or he has acted in 'willful disregard' of the plaintiff's safety). On this point, the *Ziccardi* and *Miller* cases similarly present no conflict with respect to application of the "deliberate indifference" standard, because like *Rivas*, the *Ziccardi* and *Miller* cases did not involve application of a "deliberate indifference" standard. *Ziccardi*, 288 F.3d at 67; *Miller*, 174 F.3d at 375-76. Instead, the Court of Appeals in *Ziccardi* and *Miller* applied greater standards of culpability to the facts of those cases (*Ziccardi*, 288 F.3d at 67; *Miller*, 174 F.3d at 375-76), and, thus, do not present compelling reasons to consider, as Petitioner's request, the circuit courts' application of the deliberate indifference standard. (Pet. at 18).

2. Sixth Circuit

Similarly, the cases of *Estate of Owensby v. City of Cincinnati*, 414 F.3d 596 (6th Cir. 2005) and *Ewolski v. City of Brunswick*, 287 F.3d 492 (6th Cir. 2002) are

distinguishable, not conflicting. Petitioners contend that the Sixth Circuit, with these cases, have recognized "deliberate indifference claims" absent "special circumstances (*i.e.*, custody or state-created danger)." (Pet. at 18). This simply is not true.

The *Estate of Owensby* case involved *a custodial situation* where police officers, after making an arrest through brutal means and confining the decedent in a squad car, waited around greeting other officers, straightening their uniforms, picking up dropped items and discussing "the apparent severity of [the decedent's] injuries" without ever attending to the decedent. 414 F.3d at 603. The Sixth Circuit determined that due to the custodial situation and the fact that deliberation upon the need to provide medical attention was possible, "deliberate indifference" could rise to a conscience shocking level. *Id.*

The *Ewolski* case involved a claim based upon a "state-created danger" theory where police officers, involved in a two-day standoff with the decedents, escalated the confrontation, which resulted in a murder-suicide involving a deranged husband, his wife and his son. 287 F.3d at 509. Despite Petitioners' contention, the Sixth Circuit did not apply a deliberate indifference standard absent a "special circumstance" such as a state-created danger. Indeed, *Ewolski* involved affirmative acts by the police escalating the confrontation including a directive that an armored vehicle ram through a living room wall and inject tear gas into the residence. *Id.* at 499. The Court of Appeals, considering the affirmative acts of the police, held that the conduct did not exhibit deliberate indifference to the safety of the hostages. *Id.* at 514.

3. Tenth Circuit

Nor does *Radecki v. Barela*, 146 F.3d 1227 (10th Cir. 1998) represent a conflict in application of the "deliberate indifference" standard. First, the *Radecki* case proceeded on a state-created danger theory, so Petitioners are wrong to suggest that the Tenth Circuit "recognize[d] deliberate indifference claims without a showing of special circumstances (*i.e.*, custody or *state-created danger*)." (Pet. at 18 (emphasis added)). Second, the *Radecki* case never adopted the deliberate indifference standard. 147 F.3d at 1232. To the contrary, the Tenth Circuit applied the higher standard set forth in *Lewis*, the "intent-to-injure" standard. *Id.* Finally, the *Radecki* Court reversed the lower court's denial of defendants' summary judgment motion and entered judgment in favor of the defendants. *Id.* at 1232. It found no constitutional liability. *Id.* It does not conflict with the Fourth Circuit's decision.

III. This case is not ideal for considering application of the "deliberate indifference" standard, because no reasonable jury could conclude that Respondent Coombe's conduct *was* deliberately indifferent.

Reviewing the record, the Fourth Circuit in this case at least suggested, if not explicitly recognized, that Respondent Coombe, once he became aware of Waybright's deteriorating condition, was not deliberately indifferent to Waybright's needs. (Pet. App. at 19a-20a). Rather, Respondent Coombe "did not ignore or disregard Waybright's distress when he learned of it." (Pet. App. at 19a). Again, it was important to the

Fourth Circuit to open its opinion with the fact that "Andrew Waybright died by accident. . . ." (Pet. App. at 3a). The Court recognized that "[a]fter Waybright stood up in an effort to continue, it was Coombe who told him to rest instead," and that "Coombe assigned a second firefighter (one with medical training) to look after Waybright, and told a third firefighter to get a vehicle to pick Waybright up." (Pet. App. at 19a). The Court of Appeals appropriately determined, "This conduct is a far cry from shocking the conscience." (Pet. App. at 19a). Again, Petitioners' initial complaint in state court alleging only negligence was a tacit admission that not even the deliberate indifference standard can be properly met on this record. The lack of evidence of deliberate indifference does not favor a writ of certiorari to consider application of that standard.

CONCLUSION

There are no compelling reasons to grant the Petition for a Writ of Certiorari. For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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